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Compliance of Saskatchewan Laws with the Canadian Charter of Rights and Freedoms

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COMPLIANCE OF SASKATCHEWAN LAWS WITH THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

DISCUSSION PAPER

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Saskatchewan

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PREFACE

The Canadian Charter of Rights and Freedoms has changed the foundations of Canadian politics and law. Traditionally, there have been two components to Canadian constitutional law; the first concerning the relationships between federal and provincial governments, and the second dealing with the relationships among the three branches of government -- the legislature, the executive and the judiciary. A third set of relationships, namely those between governments and citizens, was not often addressed in a constitutional context, because the Constitution Act, 1867 was virtually silent about those relationships.

The Charter has completely changed this picture. As Justice Estey said in the first Charter case to be decided by the Supreme Court of Canada, Law Society of Upper Canada v. Skapinker:

> With the Constitution Act, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights.

The Charter came into force on April 17, 1982. On April 26, 1982, the Conservative Government of Saskatchewan was elected and shortly thereafter I was appointed Attorney General. The Government recognized that the Charter imposes new and substantial obligations on it, and so one of the first things I did as Attorney General was order a comprehensive review of all the laws of Saskatchewan with a view to determining whether they complied with the Charter. Our purpose in so doing was to acknowledge our constitutional duty to safeguard the entrenched rights of those subject to Saskatchewan laws, and to live up to that duty by making sure that Saskatchewan laws do not violate the Charter.

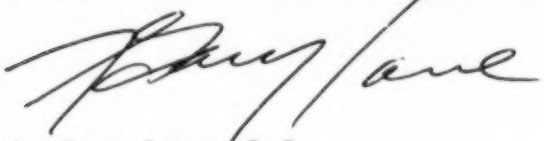
The review was started in the summer of 1982. It was initially undertaken by staff lawyers in the Constitutional Branch of the Department of Justice. As well, since Saskatchewan must ensure that its laws comply with The Saskatchewan Human Rights Code and with various international human rights documents, a representative of the Saskatchewan Human Rights Commission knowledgeable in both areas served on the review committee throughout the summer months of 1982.

The committee examined all Saskatchewan statutes and analyzed them to determine whether they complied with all the provisions of the Charter. Thus, the review encompassed section 15 of the Charter (the equality provision) even though that section will not come into force until April 17, 1985, three years after the rest of the Charter came into force.

The review has now been completed. The results indicate that several Saskatchewan laws appear to violate the Charter. Section 33 of the Charter would permit the government to avoid Charter violations by amending each law to state that it operates notwithstanding the Charter. However, our position is that section 33 should be used only in the most compelling circumstances, and that it should not be used in the case of any of the provisions discussed in this Discussion Paper. Thus, the next step in the review process will be the introduction and enactment of an omnibus bill of Charter-related amendments to Saskatchewan laws. This step will be taken in the fall of 1984 or the spring of 1985, but certainly before April 17, 1985, which is the date on which the entire Charter comes into force.

But before this step is taken, the Government is anxious to receive the views of interested members of the public concerning the proposals in this Discussion Paper. The essential purpose of the Charter is the protection of the rights of individuals, and the Government firmly believes that Saskatchewan individuals have an important contribution to make in the process of ensuring that all laws comply with the Charter. Accordingly, we invite individuals and groups to tell us whether they agree with the changes proposed in this Discussion Paper and whether we have missed any laws which, in their opinion, do not comply with the Charter. All comments that are received will be seriously considered by the Government before the omnibus bill is put in its final form.

The amendment of the Saskatchewan laws identified in this Discussion Paper will be an important step for the Government and people of Saskatchewan. However, it will not be the final step under our new Charter of Rights and Freedoms. The Government is committed to an ongoing review of its existing laws and policies under the Charter, and to a process of examination of new legislation, as the meanings of the Charter sections become clearer through decided cases.



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INTRODUCTION

The Review Process

This Discussion Paper is the outcome of a two-year review of Saskatchewan legislation, conducted with an eye to ensuring that all Saskatchewan laws comply with the Canadian Charter of Rights and Freedoms. The scope of the review was wide-ranging.

The evaluation of the provisions which were identified as raising Charter-related issues was a difficult process. In each case the process required the balancing of competing factors -- the likelihood that a provision on its face would violate a Charter right against the value of the policies embodied in the provision. Laws which apparently violated some right protected by the Charter were divided into three rough categories: the first of laws where the apparent violation is clearly justifiable as necessary to attain some valuable policy goal, the second of laws where it is arguable that the apparent violation is justifiable, and the third of laws where it is quite clear that the apparent violation can not be justified. The provisions analyzed in this Discussion Paper fell for the most part into the last category.

This balancing procedure outlined above flows from the very structure of the Charter. The rights laid out in the Charter cannot be absolute. Section 1 of the Charter provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

It is quite clear from the cases that have been decided under the Charter that section 1 requires the government, or those seeking to uphold a law which on its face appears to infringe or deny a Charter right, to bring enough evidence to convince the court that the infringement or denial is justified in the circumstances. Some examples of Saskatchewan laws which can be justified in this way follow.

1. Section 3 of the Charter gives every citizen of Canada the right to vote in provincial elections. Subsection

28(2) of The Election Act of this province, however, puts several limitations on what appears in the Charter to be an unqualified right to vote. A voter in a Saskatchewan election must be 18 years old, have resided in Saskatchewan for six months prior to the date on which the election was called, and reside in the constituency in which he or she seeks to vote. Clearly, these restrictions on the right to vote are justifiable. Voters in an election should be able to understand the issues and the significance of what they are doing, and should have some measure of commitment to the geographical area which the elected representatives will govern. Once it is acknowledged that some lines are justifiable and must be drawn, where they are drawn (at age 18 and six months residency) is a decision which the legislators can make under the Charter, provided that they make it reasonably.

2. Section 15 of the Charter provides that every individual is equal and has the right to the equal protection and equal benefit of the law without discrimination on the basis of age. Yet section 24 of The Vehicles Act, 1983 prohibits driving where a person is under the age of 16. Some limitation based on age is clearly justifiable on the basis that only individuals who are likely to be able to exercise the skill and judgment that driving a motor vehicle requires should be entitled to apply for a license to drive. The cut-off age of 16 is constitutional as long as the choice of that age is, as it appears to be, reasonable.

3. Discrimination on the basis of sex is another prohibited ground of discrimination under section 15 of the Charter. Section 15(4)(k) of The Labour Standards Act provides, however, that the Minimum Wage Board may make orders requiring employers to provide free transportation home to their female employees who finish work between 12:30 a.m. and 7:00 a.m. Such a requirement seems to be justifiable on the basis that women are more likely than men to be in danger by reason of travelling home very late at night.

These laws and others like them are provisions which on their face, might appear to violate the Charter, but which can be justified according to the criteria set out in section 1 and are therefore constitutional.

The Scope of the Review

Although the review of legislation was comprehensive, this Discussion Paper is limited in two respects.

First, the review did not address Saskatchewan regulations or other subordinate legislation. The Government recognizes that the Constitution requires delegated legislation to comply with the Charter. However, a major project of collecting and consolidating all of the regulations of Saskatchewan is now underway. When this project is completed, a review of regulations similar to the review of statutes that has already been done will commence.

A second limitation in the Discussion Paper is that none of the laws identified as potential Charter violations relate to search and seizure. Section 8 of the Charter gives everyone "the right to be secure against unreasonable search or seizure". Numerous Saskatchewan laws confer powers on the police or on other officers to make searches or seizures in specified circumstances, and clearly these laws are subject to the Charter. The reason there is no mention of them in this Discussion Paper is that it is not yet clear what "unreasonable search or seizure" means. This phrase has not been interpreted by our highest court, the Supreme Court of Canada, and interpretations coming from the lower courts of the provinces are conflicting. In view of the very uncertain state of this part of the law, it would be premature to make recommendations for changes to Saskatchewan laws dealing with searches and seizures at this time. The Government of Saskatchewan is, however, committed to reviewing those laws as soon as the scope of section 8 of the Charter has been clarified.

The Charter Provisions

The Charter applies to the governments of Canada and the provinces, and the standards it introduces govern the relationships between governments and citizens. The Charter was not intended to apply to relationships which do not involve governments. Thus, the Charter sets standards with which government legislation, regulations and practices must comply. The standards citizens must comply with in their dealings with each other, for example as employer to employee or landlord to tenant, are set by human rights statutes such as The Saskatchewan Human Rights Code.

The substantive rights and freedoms which governments must respect under the Charter include democratic rights, mobility rights, legal rights, equality rights, language rights and the fundamental freedoms of conscience, religion, expression and association. In the review of Saskatchewan legislation, some sections of the Charter appeared to be violated more often than others. For ease of reference, these sections will be described briefly here.

Section 6(2) - Domestic Mobility Rights

This section gives citizens and permanent residents of Canada the right to move to and take up residence in any province and the right to pursue the gaining of a livelihood in any province. The section does not create a "right to work". What it does is prevent a province from discriminating between workers on the basis of their province of present or previous residence. Thus, provincial laws cannot constitutionally require an individual to be a resident of the province before he or she is eligible to take up a particular position or occupation.

Section 7 - The Right to Life, Liberty and Security of the Person

The key to section 7 is that individuals have the right to "fundamental justice" in any process or proceedings which may result in their being deprived of life, liberty or security of the person. Examples of such procedures are trials which may result in imprisonment or the process by which mentally ill people may be committed to institutions without their consent. Essentially, fundamental justice refers to procedural safeguards such as notice that the process or proceedings is going to take place, notice of the facts and legal principles which may result in a denial of life, liberty or security of the person, and the opportunity for the person affected to make his or her own story known in answer before a fair and impartial arbiter.

Section 11(d) - The Right to be Presumed Innocent Until Proven Guilty

Section 11(d) ensures that a person who has been charged with an offence cannot be convicted in the absence of evidence sufficient to convince an independent and impartial tribunal that the person is guilty of the offence. The section does not, however, provide absolute

protection against "reverse onus clauses", which are statutory provisions requiring an accused person to carry the burden of proving facts showing the absence of a particular element of an offence. According to the leading case, R. v. Oakes, reverse onus clauses should be upheld under the Charter if (1) the offence is very serious in that it results in grave harm or occurs frequently, (2) it is very easy for the accused to disprove the facts, and (3) it would be very difficult for the prosecution to prove the facts. Reverse onus clauses would appear to be unconstitutional where they fail to meet the Oakes test or where the accused is in effect required to disprove the entire offence, instead of only one element or part of it.

Section 15 - Equality Rights

This section provides that all people are equal before and under the law and have the right to the equal protection and equal benefit of the law. When it comes into force on April 17, 1985, section 15 will prohibit all forms of discrimination. In particular, discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age and mental or physical disability will be prohibited. Three of these kinds of discrimination are, according to the results of the review of Saskatchewan legislation, more prevalent than others in this province's laws: discrimination on the basis of sex, discrimination on the basis of age, and discrimination on the basis of mental or physical disability. Affirmative action provisions, or laws that aim to ameliorate the condition of disadvantaged individuals or groups, will not be precluded by section 15.

The Purpose of this Discussion Paper

This paper is the product of the review process outlined above. Its purpose is to provide the people of Saskatchewan with the opportunity to comment on the proposals and to participate in the process of reforming our laws to comply with the Charter.

In the following pages, the laws which the review committee felt violated the Charter are listed and described. The specific sections which appear to contravene the Charter are identified, the reason for each perceived contravention is explained, and a proposed remedy or set of alternative remedies is outlined. The Acts are listed according to the Department of Government responsible for administering them.

B. PROPOSED AMENDMENTS BY DEPARTMENT

1. ADVANCED EDUCATION AND MANPOWER

The Apprenticeship and Tradesmen's Qualification Act

This Act requires persons to qualify themselves for specified trades through a period of apprenticeship. Where the candidate for apprenticeship is a minor, section 12(b) of the Act requires the contract to be signed both by the apprentice and by his or her father. This appears to violate section 15 of the Charter, which prohibits discrimination on the basis of sex, and would be remedied by an amendment giving either parent of the minor authority to sign the contract.

Additionally, in keeping with the spirit of the Charter, the name of the Act should be changed to The Apprenticeship and Trade Certification Act.

2. AGRICULTURE

The Agricultural Development and Adjustment Act

The Act provides for educational assistance to farmers who have sold their farms and have realized less than $15,000 on the sale. As currently worded, section 42(1) makes this assistance available only to farmers between 21 and 60 years of age. This appears to violate section 15 of the Charter, which prohibits discrimination on the basis of age. An amendment deleting the age restriction entirely would remedy this problem.

The Farm Security Act

The Farm Security Act suspends the operation of foreclosure orders which affect the homestead of a mortgagor. Section 7(10) of the Act extends this protection to "the widow" of a mortgagor. In not extending protection to widowers, the section discriminates on the basis of sex. An amendment replacing the word "widow" with "spouse" would bring the section into conformity with section 15 of the Charter.

The Provincial Lands Act

The Act governs, among other things, the disposition of provincial lands by lease. Sections 20(1)(a) and 26(1)(a) restrict the term of any lease to the lesser of 47 years or a period ending on "the last day of the year in which the lessee...attains the age of 65 years", thus discriminating on the basis of age contrary to section 15 of the Charter. These sections should be amended to stipulate a maximum term applying to all lessees.

3. CONSUMER AND CORPORATE AFFAIRS

The Partnership Act

This Act deals with relations between persons carrying on a business in common. Section 4 delineates rules which determine whether a partnership does or does not exist.

Section 4.3(c) appears to violate section 15 of the Charter by discriminating on the basis of sex. It provides that a widow who receives a portion of the profits of a business in the form of an annuity is not a partner only by receiving such annuity. This presumes that the partner is male, the spouse of the partner female, and suggests that the widower of a female partner would not be entitled to the benefit of this presumption. It is therefore recommended that the section be amended by replacing the word "widow" with the word "spouse".

4. EDUCATION

The Education Act

The Education Act regulates the administration of education in the province. Section 34 of this Act outlines situations where a member of a board of education must vacate his or her office. One of these is "incapacity by reason of physical or mental illness". This appears to violate section 15 of the Charter by defining incapacity solely in terms of mental or physical illness. It is therefore recommended that the words "by reason of physical disability or mental illness" be deleted. In the result a person who is incapacitated for any reason could be asked to vacate his or her office.

Section 181 authorizes religious instruction and the reading of the Lord's prayer and Bible passages in schools. Subsection 3 provides that a student who does not wish to participate in courses of religious instruction may, with written permission from his or her parent or guardian, be exempt from these courses. There is, however, no similar subsection with respect to the reading of the Lord's prayer or passages from the Bible. This appears to be inconsistent with section 2(a) of the Charter which guarantees everyone freedom of religion. The term "freedom of religion" is a difficult one to define. Generally it has been interpreted to mean that everyone has the freedom to engage in the religious activities and hold the religious beliefs of his or her choice, and not to be compelled to participate in the activities of a particular religion he or she does not choose. So, although the Legislature can pass laws which contain provisions for the exercise of a particular religion, it cannot compel persons of other faiths or religions to participate in them. Compulsion is, however, the result of section 181 of The Education Act, since there is currently no provision which allows a pupil to withdraw from prayer or Bible readings. It is therefore recommended that a new subsection similar to subsection 181(3) be added to the Act to allow pupils who have written consent from their parent or guardian to be exempt from attending while the Lord's prayer or Bible passages are being read.

The Registered Music Teachers Act

This Act governs the Association of Registered Music Teachers in the province. Section 10(2)(c) of the Act specifies that only those persons who have resided in Saskatchewan for 6 months are entitled to apply for membership. This appears to violate section 6 of the Charter which guarantees mobility rights to every citizen and permanent resident of Canada. It is therefore recommended that section 10(2)(c) be repealed.

5. ENVIRONMENT

The Litter Control Act

The Litter Control Act makes it an offence to fail to comply with a court order requiring the removal of waste from lands specified in the order. In proceedings against a person who is charged with this offence, section 5(2) of

the Act places the onus of proving compliance with the order upon the accused. This section appears to violate section 11(d) of the Charter, which provides that an accused has the right to be presumed innocent until proven guilty according to law. This violation could be remedied by repealing section 5(2).

6. CHIEF ELECTORAL OFFICER EXECUTIVE COUNCIL

The Election Act

Several provisions of The Election Act appear to be inconsistent with the Charter.

Section 29 identifies rules in relation to the residence of voters and provides definitions for, among other things, what constitutes the ordinary residence of a married woman. Pursuant to section 29(12), a married woman's ordinary residence is deemed to be where her husband resides, subject to several exceptions. As this appears to discriminate on the basis of sex contrary to section 15 of the Charter, it is recommended that section 29(12) be repealed.

Section 29(13) also appears to violate section 15. The wording assumes that all Members of Parliament are male by referring to the spouse of the Member as "she". This may be remedied by replacing the word "she" with the words "that spouse".

Section 157 provides that the returning officer or deputy returning officer has the power of arrest and imprisonment at a polling place or nomination. As written, this appears to violate section 9 of the Charter, which gives everyone the right not to be arbitrarily arrested and detained. However, as it is fundamental to the democratic process that voters not be intimidated or deterred from casting their votes, it is recommended that a section be added to the Act making it an offence for a person to disturb the peace and good order at a polling place. This will preclude the arbitrariness, which is inconsistent with the Charter, while ensuring that improper behavior at the place of polling is deterred.

7. FINANCE

The Certified Public Accountants Act

This Act governs the Association of Certified Public Accountants in Saskatchewan. Section 13 provides that in order to try the examination to become certified as a public accountant a person must reside in Saskatchewan. This appears to violate section 6 of the Charter which guarantees to every citizen and permanent resident the right to move to and gain a livelihood in any province. To redress this situation, it is recommended that the requirement of Saskatchewan residency for a person applying for the examination be deleted.

8. HEALTH

The Change of Name Act

This Act outlines the steps which must be followed in order to effect a legal change of name. Two provisions of The Change of Name Act discriminate on the basis of sex contrary to section 15 of the Charter. Both provisions relate to the custom at common law whereby a married woman assumes the surname of her husband.

At present, section 3 creates an exception to the statutory change of name procedure for married women wishing to exercise this common law option, and section 19 sets out a simplified substitute procedure, under which the married woman has three choices. She can use her husband's surname, her maiden name, or the legal surname she had immediately prior to her marriage. The section requires the wife to give notice to the Director of Vital Statistics and pay a fee if she intends to use her maiden name or other surname as her legal name, thus presuming that a married woman will use her husband's surname.

It is recommended that section 3 be amended to extend the exception to married individuals of both sexes, and that section 19 be repealed entirely. In the result, either spouse would be free to use, as his or her legal name, the surname of the spouse or the legal surname he or she used immediately prior to the marriage. The legal effect of the name chosen would derive, as at common law and in other provinces, from the fact that the person uses the name and is known by it in the community and not from the

fact of compliance with the formal steps set out in the Act.

The Marriage Act

This Act governs the solemnization of marriage in the province. Sections 53 and 54 discriminate on the basis of mental or physical disability contrary to section 15 of the Charter. Section 53 prohibits the marriage of persons who are mentally retarded or mentally ill as defined in the regulations or who have a specified communicable disease. Subsections 54(1) requires a member of the clergy or marriage commissioner to refrain from performing a marriage if he or she knows or has reason to believe that one of the parties is mentally ill or mentally retarded or has a communicable disease. It is recommended that these sections be repealed.

Subsections 54(2) through (7) are ancillary provisions relating to the testing for communicable disease. These subsections do not clearly violate any right guaranteed by the Charter, but it is recommended that they be repealed at the same time as the provisions mentioned above for the following reasons:

1. They discriminate on the basis of marital status. This is not an enumerated ground of discrimination under section 15, but may be within the scope of that section in any event.

2. The sections are not perceived to be necessary by the Department of Health or the medical community.

Other sections of the Act should be repealed in conjunction with the above changes. Subsections 58(a) and (b) of the Act give the Lieutenant Governor in Council the power to make regulations defining "mentally ill" and "mentally retarded" and specifying communicable diseases for the purpose of subsection 53(c). Section 61 creates an offence where a member of the clergy or marriage commissioner performs a marriage contrary to section 54. As both these sections are clearly consequent upon sections 53 and 54, they should also be repealed.

The Medical Profession Act, 1981

This Act governs the activities of the medical profession in Saskatchewan. Section 59 provides for the establishment of mental health committees which have the power to inquire into the possible mental illness, alcoholism, or drug addiction of a physician, and as a result of the inquiry to suspend the physician or impose conditions on his or her continued practice. This section appears to discriminate on the basis of mental or physical disability contrary to section 15 of the Charter. It is recommended that the section be amended, so that an inquiry may be made and a physician suspended where, for any reason, his or her continued practice would constitute a danger to the public.

The Mental Health Act

This Act provides a framework for the delivery of mental health services in Saskatchewan and establishes rules and procedures governing the civil commitment of persons suffering from mental illnesses.

The need for changes to the Act arises from section 15 of the Charter, which guarantees the mentally disabled equality before and under the law, and from section 7 of the Charter, which provides everyone the right not to be deprived of liberty and security of the person except in accordance with the principles of fundamental justice. In light of these Charter provisions, it is suggested that The Mental Health Act should embody two principles: (1) that mentally ill persons should, as much as possible, be treated in the same way as other persons in need of medical care; (2) that the manner of treatment of mentally ill patients should represent the least restrictive alternative.

The following changes are therefore under consideration:

1. Replacing current committal criteria (which permit committals for a patient's "welfare") with criteria which permit a person to be committed involuntarily to an in-patient facility only where: (a) the person is suffering from a severe mental disorder; (b) there is a reasonable prospect that the disorder is treatable and effective treatment can be administered only at the facility; (c) the person lacks capacity to make an

informed decision concerning treatment; and (d) as a result of the severe mental disorder, the person is likely to cause harm to self or others, or is likely to suffer substantial mental or physical deterioration.

2. Abolishing the power now contained in subsection 15(2) of the Act permitting the detention of informal patients for up to twenty-four hours after they have requested a discharge.

3. Establishing a patient advocate service to inform involuntary patients upon committal of their right to request a review and other rights, and to provide assistance to patients who wish to seek such review.

4. Spelling out procedural safeguards to ensure that patients can bring their cases before review panels without delay, and are accorded a full and fair hearing before those panels.

5. In light of improved procedural safeguards, extending the maximum period of initial committal to 21 days from 14 days, but requiring a hearing to renew a committal beyond 21 days.

6. Requiring the treatment given to involuntary patients to be the least intrusive alternative for treating the mental disorder.

7. Prohibiting the use of psychosurgery, aversive therapy and experimental treatments on involuntarily committed patients.

Additional changes to streamline the Act and to bring its provisions up to date are under consideration.

The Pharmacy Act

Two sections of The Pharmacy Act appear to discriminate on the basis of mental or physical disability contrary to section 15 of the Charter. Section 76 provides that the Saskatchewan Pharmaceutical Association may hold an inquiry into the condition of a pharmacist who may be mentally or physically disabled. Section 77(1) gives the council the power to suspend a pharmacist whose continued practice, by reason of his mental or physical disability, constitutes a danger to the public. The sections should

be amended to remove all references to "mental or physical disability", so that an inquiry may be made and a pharmacist may be suspended where, for any reason, his or her continued practice could constitute a danger to the public.

The Public Health Act

Under this Act, an inspector appointed by the Minister of Health or a municipality may inspect substances intended for human consumption, and the premises on which such substances are manufactured or from which they are dispensed. If the inspector believes the substances are injurious to health, they may be seized to prevent their consumption. Section 50 provides that the owner or possessor of seized goods is guilty of an offence unless he proves that he "did not know and had no means of knowing" their condition. This section appears to contravene section 11(d) of the Charter, which guarantees the right to be presumed innocent until proven guilty. It should be amended to provide that guilt is made out only upon proof that the accused person had knowledge of the condition of the goods.

The Saskatchewan Hospitalization Act

Section 8 of The Saskatchewan Hospitalization Act provides that every self-supporting resident of Saskatchewan is personally liable for the payment of taxes levied to fund the medical care insurance scheme. However, a married woman who is in receipt of income and whose husband is self-supporting is deemed not to be supporting herself, unless she is separated from her husband pursuant to a decree of judicial separation or separation agreement, or had deserted him. This presumption discriminates on the basis of sex, and is thus contrary to section 15 of the Charter. It should be repealed. Section 25(3) of The Saskatchewan Medical Care Insurance Act is virtually identical to section 8(3) of The Saskatchewan Hospitalization Act, raises the same issue under the Charter, and should similarly be repealed.

The Saskatchewan Medical Care Insurance Act

This Act provides for the payment of physicians and certain other medical professionals, such as chiropractors, dentists, optometrists and specialists, for

services given in treating persons deemed to be beneficiaries under the Act. The Act is administered by a commission whose membership is governed by section 4. Subsection 10 of this section gives the Lieutenant Governor in Council the power to declare that a vacancy in the membership of the commission exists where it appears that a member cannot perform his duties as a member because of a mental or physical disability. This appears to discriminate on the basis of mental or physical disability contrary to section 15 of the Charter. It is therefore recommended that the subsection be amended to remove all reference to mental or physical disability. In the result, any member who is unable for any reason to perform his or her duties as a member could be asked to vacate the office.

The South Saskatchewan Hospital Centre Act

The purpose of this Act is to govern the operation of a hospital centre for residents of southern Saskatchewan. Section 4 relates to the membership and term of office of the Board of Governors. Subsection 12 of this section gives the Lieutenant Governor in Council the power to declare that a vacancy in the membership of the board exists where it appears that the member is unable to perform his or her duties because of mental or physical disability. This appears to discriminate on the basis of mental or physical disability contrary to section 15 of the Charter. The subsection should be amended in the same way as subsection 4(10) of The Saskatchewan Medical Care Insurance Act, so that any member who is unable for any reason to perform his or her membership duties could be asked to vacate the office.

The Venereal Diseases Prevention Act

This Act governs the testing for and reporting of cases of venereal disease in the Province. Sections 13 and 14 deal with the testing of persons who are under arrest or in custody having been charged or convicted of any Criminal Code or provincial offence. Section 13 provides that such persons may be required to undergo examination and testing to ascertain whether they are infected with venereal disease. In the case of persons who have been charged with sexual offences, including procuring, living off the avails of prostitution and being found in a common bawdy house, the medical examination is mandatory. No

procedural protection is provided in either case, so the person being tested is deprived of his or her liberty or security of the person without "fundamental justice" as required by section 7 of the Charter. This infringement of a Charter right could be remedied by including sufficient procedural safeguards in the Act or by repealing the section entirely. The latter is the preferred option.

Section 14 of the Act permits the medical health officer or Minister of Health to require a person who, under section 13, has been found to be infected with venereal disease, to undergo treatment. The same section permits the person found to be infected to be detained in custody until a cure has been effected even where that person would otherwise be entitled to release. Section 14 would appear to violate not only section 7 (in that the person may be subjected to medical treatment without consent) but also section 9, which safeguards the right not to be arbitrarily detained or imprisoned. For these reasons, and because it is clearly consequent upon section 13, it is recommended that section 14 be repealed.

The Vital Statistics Act

The Vital Statistics Act currently provides in section 4 that the birth registration of a child of a married woman must be in the name of the woman's husband and must indicate that he is the father of the child, unless the mother files a declaration stating that at the time of the conception she and her husband were living apart and that her husband is not the father. This discriminates on the basis of sex, because in the absence of the declaration it is not possible for the child's birth to be registered in the mother's name. To remedy this, it is recommended that the section be amended to provide that a birth to a married woman may be registered in the name of either the woman or her husband. It is also recommended that the Act be amended to make it possible to register the birth of a child in a surname which is a hyphenation of the surnames of the parents.

9. HIGHWAYS

The Vehicles Act, 1983

When a person is charged under The Vehicles Act, 1983 with speeding, section 81 places the onus of proving compliance with the Act on the accused. This is a reverse onus clause which appears to violate an accused person's right to be presumed innocent until proven guilty, contrary to section 11(d) of the Charter. The clause does not satisfy the test outlined in R. v. Oakes (discussed in the Introduction) because the speed at which the accused was driving is not a fact which is more easily proved by the accused than by the Crown. It is therefore recommended that section 81 be repealed. In the result, the onus of proof will remain on the Crown throughout. This onus will not be unduly difficult to discharge as section 173 of The Vehicles Act, 1983 allows the Crown to introduce the results of a speed test as prima facie proof of the speed at which the accused person was driving.

10. JUSTICE

The Absconding Debtors Act

The purpose of this Act is to prevent debtors from removing assets from the province with the intent to defraud creditors. Section 3(2) refers to the "wife of a debtor" thus presuming the debtor to be male. This appears to be inconsistent with section 15 of the Charter by discriminating on the basis of sex. It is therefore recommended that section 3(2) be amended to replace the word "wife" with "spouse".

The Corrections Act

This Act governs the probation, incarceration, community training, and parole of persons who have been convicted of offences under provincial laws. Part V of the Act deals with parole. Section 44 relates to suspension of parole where the chairman of the Release Authority is satisfied that the paroled inmate has breached the terms under which he or she was released. Upon apprehension, the inmate must serve the time which remained in the sentence when parole was originally granted. Since time spent on parole is legally part of the duration of the sentence, the effect of section 44 is that the inmate must serve the

full sentence, plus the length of time he or she was actually out on parole. This amounts to an increase in sentence without the procedural protections of a trial, and appears to violate the following sections of the Charter: section 7, which guarantees the right not to be deprived of liberty except in accordance with the principles of fundamental justice; section 9, which provides a right not to be arbitrarily detained or imprisoned; and section 11(h), which protects persons from being tried or punished twice for an offence.

These apparent Charter violations could be remedied in three ways: by an amendment providing that the apprehended parolee must serve only the time remaining in his or her sentence at the time of the apprehension; by a new provision creating an offence for breach of parole for which the parolee would be tried, convicted and sentenced according to law; or by repealing the section entirely. Because no inmate has been paroled under Part V of the Act in about 15 years, the preferred course is to repeal section 44.

The Dependants' Relief Act

This Act provides relief for dependants of persons who have died without making provision for the maintenance of their dependants. Section 9(2) provides that the allowance of maintenance for the "wife" of a testator shall not be less than the amount "she" would have received from the court had the testator died without a will. This presumes that the testator is a man and the dependant is a woman, and does not confer the same rights on a dependent husband. To rectify this apparent violation of section 15 of the Charter it is recommended that the word "wife" be replaced with "spouse" and the word "she" be replaced with "that spouse".

The Deserted Wives' and Children's Maintenance Act

The purpose of this Act is to provide a wife who has been deserted with maintenance sufficient to provide her and her children with food and necessaries. The entire Act appears to be inconsistent with section 15 of the Charter. It follows the common law presumption that a wife is a dependant who is entitled to maintenance as of right. It does not, however, give similar rights to deserted husbands. Consequently, it is recommended that

the wording be changed to grant rights to any deserted spouse, male or female.

Section 11, which provides that no order shall be made in favour of a wife who has committed adultery, is inconsistent with the spirit of section 15. Firstly, its absolute nature results in harsh results and secondly, it reflects an archaic view of married women as property. Retention of the bar based on adultery would not in itself be contrary to the Charter as long as it applied equally to both husbands and wives. However, for reasons of public policy it would be preferable to repeal the section.

The Act defines "child" in section 2(b) as a person under the age of 16 years (with 3 qualifications). This is inconsistent with other Acts such as The Dependants' Relief Act and is not based on the age of majority. It therefore appears to discriminate on the basis of age contrary to section 15 of the Charter. It is recommended that during a revision of this Act these inconsistencies be resolved.

Finally, in keeping with the spirit of the Charter and the proposed changes, it is recommended that the name of the Act be changed.

The Exemptions Act

The Exemptions Act declares that certain articles of a debtor are free from seizure by a creditor as they are deemed necessary to the debtor to live or to carry on his or her business, trade or profession.

Section 2(b) exempts the property of a "professional man". This wording is inconsistent with the spirit of section 15, and it is recommended that the section be amended by replacing the word "man" with "person".

Section 6 appears to discriminate on the basis of sex. It assumes the debtor to be male by exempting property that is for the use and enjoyment of his "widow" or for her maintenance. Sections 7 and 8 also discriminate on the basis of sex by referring to the "wife" and "widow" of the debtor. These sections should be amended by replacing these words with "spouse".

The Homesteads Act

The purpose of The Homesteads Act is to protect the rights of a wife of an owner of property if the owner decides to transfer his interest to a person other than his wife. The Act discriminates in its entirety against both sexes contrary to section 15 of the Charter in that it confers a special and protected status on women. It is recommended either that the wording throughout the Act be changed to make the provisions applicable to either spouse of a registered owner in accordance with the recommendations of the Law Reform Commission, or that the Act be repealed.

The Legal Profession Act

Section 73(1) of this Act provides for the appointment of a trustee of a lawyer's property in certain situations for the purpose of winding up the legal business of the lawyer.

Pursuant to section 73(1)(d) one of these situations is when a member is mentally incapacitated. This appears to violate section 15 of the Charter by discriminating on the basis of mental disability. Moreover, in light of the power in section 73(1)(e), which provides for the appointment of a trustee in cases where the member is unable to practise because of illness or other reason, section 73(1)(d) would appear to be unnecessary. It is therefore recommended that clause (d) be deleted.

The Libel and Slander Act

Section 25 of this Act provides for a prima facie offence for slander founded on words imputing unchastity or adultery to a female. This appears to be in violation of section 15 of the Charter. It is recommended that the section be repealed.

The Married Persons' Property Act

At common law, once married, a woman had no power over her property; her husband was the one legally authorized to deal with it. Consequently, if the husband incurred debts, the wife's property could be used to satisfy creditors.

Essentially, the purpose of The Married Person's Property Act was to provide protection for a married woman from the common law, to give her power over her own property and to protect her property from the debts of her husband. However, despite its remedial nature, it did not go far enough. It did not address other rules of the common law which perpetuate the unequal and dependent status of married women.

For example, the domicile or permanent residence of a married woman is deemed to be that of her husband even if she is living separate and apart from him. A second example is furnished by a number of tort actions available to a husband but not to a wife. These include the right to sue a person who entices a married woman from her husband's home, who harbours or shelters her while she is away from her husband or who causes the wife injury which deprives the husband of his matrimonial rights.

In accordance with the recommendations of the Law Reform Commission, it is recommended that this Act be repealed and replaced by a new Act - one which would ensure the equality of status of married persons.

The Mentally Disordered Persons Amendment Act, 1984

Section 18.1 of this Act provides that if the wife of a mentally disordered person refuses to sign an instrument dealing with that person's interest in the homestead, or if the wife cannot be found, the committee may apply for an order from the court dispensing with the signature and acknowledgement of the wife.

This section is an exception to the provisions of The Homesteads Act which confer on wives a special status with respect to homestead property. In accordance with changes to The Homesteads Act recommended in this paper, it is proposed either that the section be repealed or that the word "wife" be replaced with the word "spouse".

The Public Trustee Act

The public trustee has the authority to administer the property of infants and mentally disordered persons. Section 43 of the Act provides that if the wife of a mentally disabled person refuses to sign an instrument dealing with that person's interest in the homestead, or if the wife cannot be found, the public trustee may obtain

an order from the court dispensing with the signature and acknowledgement of the wife.

As with section 18.1 of The Mentally Disordered Persons Amendment Act, 1981, it is recommended either that section 43 be repealed or that the word "wife" be replaced with the word "spouse".

The Queen's Bench Act

Sections 29 to 38 of The Queen's Bench Act establish jurisdiction in the court to award alimony and maintenance to a wife in actions where a decree of nullity, judicial separation, restitution of conjugal rights, or alimony alone has been requested. There is no similar jurisdiction to make such awards to a husband. These sections appear to discriminate on the basis of sex contrary to section 15 of the Charter. Their wording should be changed to permit an order of support payments to either spouse in an appropriate case.

By section 31 of the Act, the court may order the husband to pay his wife sums to cover her disbursements in the action. No such order may be made to the benefit of a husband. This section should be repealed, leaving each party responsible for his or her own expenses, subject to an award of costs made in the court's discretion.

Under the Act, a wife who has committed uncondoned adultery is not in any circumstances entitled to an award of alimony. This bar is similar to the one created by section 11 of The Deserted Wives' and Children's Maintenance Act, and, like that provision, its absolute nature can dictate very harsh results. For the reasons outlined above in the discussion of The Deserted Wives' and Children's Maintenance Act, it is recommended that the bar be abolished.

The Saskatchewan Evidence Act

Section 27 of this Act provides that in a suit brought by a wife for dissolution of marriage, alimony, or judicial separation, prima facie proof of adultery shall be provided by a certificate stating that the husband was convicted during the marriage of an offence under specified sections of the Criminal Code. The sections referred to are sections 144 (rape), 146 (sexual intercourse with a female under the age of 14), 148 (sexual intercourse with a feeble-minded female), 150

(incest), 151 (seduction of a female between the ages of 16 and 18) and 153 (sexual intercourse with a step-daughter or female employee).

Section 27 appears to violate section 15 of the Charter by discriminating on the basis of sex, as the certificate is admissible only where the action was brought by a wife and the conviction related to the husband. This could be remedied either by repealing the section, or by amending it so that it relates equally to male and female spouses.

Simple repeal would result in a situation where a person suing for dissolution of marriage, alimony or judicial separation would have to bring independent proof that his or her spouse had had sexual intercourse with another, even though this fact had already been established in the criminal courts. This would involve considerable time and expense which is easily avoided by a provision like section 27.

Amendment of the section, on the other hand, poses certain difficulties because of recent changes to the specified sections of the Criminal Code. Sections 144 and 148 have been repealed. Their "replacement" sections (246.1, 246.2 and 246.3) create offences which do not require sexual intercourse to be proved. Of the remaining sections, sections 146, 151 and 153 create offences which by definition may be committed only by males. Only the offence of incest can be committed by either a man or a woman. Thus, an amendment providing that section 27 of The Saskatchewan Evidence Act applies equally to actions brought by either husbands or wives would have very little effect. This is a matter which cannot be resolved by provincial legislation. In order to accommodate possible future amendments to the Code, it is recommended that section 27 be amended to provide that in proceedings in which proof of adultery is relevant, a certificate stating that a spouse has been convicted of any Criminal Code offence which requires proof of sexual intercourse is admissible as prima facie proof of adultery.

The Saskatchewan Human Rights Code

The purpose of the Code is to protect individuals from many forms of discrimination in the context of social or private relationships such as employment and membership in professional and trade associations. The Charter does not directly affect such relationships, as by its terms it applies to governmental, not private acts. However, The

Saskatchewan Human Rights Code is a piece of legislation passed by a government, and as such it must comply with the Charter. The indirect effect is that the Charter will have an impact upon private relationships.

In light of section 15 of the Charter, it appears that the protection against discrimination presently offered by the Code is not broad enough, and it must be amended so that it complies with the requirements of the Charter.

The protection afforded to individuals in social relationships under the Code differs from the protection they are offered in their relationships with government under the Charter in three ways:

1. The Code limits protection against discrimination on the basis of age by defining "age" to mean the ages between 18 and 65. The result is that individuals who are younger than 18 or older than 65 are not afforded the equal protection of the law which is their right under the Charter.

2. The Code fails to prohibit all the categories of discrimination which are enumerated in section 15. Section 15 expressly protects individuals from discrimination on the basis of mental disability, but the Code does not address this form of discrimination. Similarly, the Code does not prohibit age discrimination in all the situations it addresses. These omissions result in a denial of equal protection of the law to the mentally disabled and the young or aged, contrary to section 15 of the Charter.

3. The Code fails to mirror the structure of section 15. Section 15 is "open-ended" in that it prohibits discrimination generally, but focusses in on a number of enumerated grounds. The Code, on the other hand, prohibits only the forms of discrimination which are listed in it. Thus the Charter would protect individuals from discrimination on the basis of whether they have children, or their physical size or appearance. The Code does not extend to protect against these forms of discrimination.

The differences outlined in 1 and 2 appear to amount to violations of section 15. The case of the difference outlined in 3 is less clear. It is therefore recommended that the Code be amended to delete the restrictions on the

meaning of "age", to extend protection to the mentally disabled, and to prohibit discrimination on the basis of age in all circumstances. To facilitate these changes, narrow exceptions would have to be written into the Code to ensure that certain characteristics could be taken into account in situations where they represent bona fide bases for distinction.

The Seduction Act

This Act modifies the common law action of seduction, which was available to the father, mother, or employer of an unmarried woman. The concept of such an action, whether at common law or under statute, is offensive to section 15 of the Charter, in that it discriminates on the basis of sex. It is recommended that the Act be repealed and the common law action of seduction abolished.

There are a number of other common law actions which are closely related to the action of seduction. These are enticement, an action available to a husband whose wife has been induced to leave the matrimonial home by the defendant, harbouring, an action available to a husband whose errant wife is provided with shelter by the defendant, and loss of consortium, which may entitle a husband to damages based on his loss of his wife's company and sexual services as a result, for example, of an accident caused by the defendant. Although there is no Saskatchewan legislation which addresses these common law actions, their close relationship with and similarity to the action of seduction would make it logical to abolish them at the same time the action of seduction is abolished. This step has also been recommended by the Saskatchewan Law Reform Commission in their "Proposals for an Equality of Status of Married Persons Act".

11. LIQUOR BOARD

The Liquor Act

In prosecutions for offences under The Liquor Act relating to the unauthorized sale of liquor, the Act creates a number of presumptions which appear to violate section 11(d) of the Charter, guaranteeing the right to be presumed innocent until proven guilty. Section 153(1) provides that a place containing "appliances or preparations similar to those usually found in places where liquors are accustomed to be sold" shall be deemed to be a place in which liquor is kept for unlawful sale,

and that the occupant of that place shall be taken to be the person who is keeping the liquor for unlawful sale. Section 153(2) provides that if liquor is found in a place together with equipment which is capable of being used in "mixing, blending, flavouring or bottling liquor", proof of that fact shall be prima facie evidence that the liquor was kept for the purpose of sale, and that the occupant of the place was keeping the liquor for sale, both contrary to the Act. These violations could be remedied by repealing the two subsections.

12. PARKS AND RENEWABLE RESOURCES

The Provincial Lands Act

The Department of Parks and Renewable Resources is charged, together with the Department of Agriculture, with administration of The Provincial Lands Act (see discussion under Agriculture). As already discussed, this Act discriminates on the basis of age in section 26(1)(a), in that the maximum term of a lease varies according to the age of the lessee. The section should be amended to provide for a fixed maximum term.

The Wildlife Act

In proceedings pursuant to charges under this Act involving the validity of a license, section 22 placed the onus on the accused to prove that the license was obtained legally. Similarly, where the prosecution involves an allegation that any wildlife was unlawfully hunted, obtained, kept, or disposed of, section 54 put the onus on the accused to prove the legality of the action. Both of these sections appeared to violate section 11(d) of the Charter which gives an accused person the right to be presumed innocent until proven guilty. Section 22 has already been repealed. Section 54 has been amended to remove the onus to prove the legality of the hunting, procuring, keeping, or disposal of wildlife.

13. REVENUE AND FINANCIAL SERVICES

Six Acts which are the responsibility of the Department of Revenue and Financial Services contain apparent violations of section 11(d) of the Charter, which gives a person charged with an offence the right to be presumed innocent until proven guilty. These Acts are:

The Corporation Capital Tax Act, section 48
The Education and Health Tax Act, section 42(1)

The Fuel Tax Act, section 22
The Insurance Premiums Tax Act, section 30(1)
The Motor Vehicle Insurance Premiums Tax Act, section 31(1)
The Tobacco Tax Act, section 30(1)

The listed sections are provisions which put the onus of proving either that no tax was payable or that payment was made on the person alleged to be required to pay. Each of these sections in effect means that an accused person must disprove the entire offence of failing to pay the tax as required by law.

Under four of the Acts, however, companion provisions state that an affidavit to the effect that no record of receipt of the tax has been found after diligent search in the appropriate office is prima facie evidence that the tax alleged to be payable was never received. In prosecutions under these Acts, there is no need for the reverse onus provisions. The prima facie proof provisions ensure that it is not inordinately difficult for the Crown to prove non-payment. It is therefore recommended that in those Acts (The Education and Health Tax Act, The Insurance Premiums Tax Act, The Motor Vehicle Insurance Premiums Tax Act and The Tobacco Tax Act), the reverse onus provisions be repealed.

The remaining two Acts (The Corporation Capital Tax Act and The Fuel Tax Act) do not provide for admission of an affidavit as prima facie proof that the tax alleged to be payable was never received. It is recommended that the reverse onus provision in each of these Acts be repealed and that prima facie proof provisions similar to those found in the other four Acts be substituted for them.

In all cases, the prima facie proof sections should be clarified to provide that an affidavit stating that no record of payment was found is prima facie proof that the tax was not received "or paid" by the accused person.

14. SASKATCHEWAN GOVERNMENT INSURANCE

The Automobile Accident Insurance Act

This Act contains several provisions which discriminate on the basis of sex, contrary to section 15 of the Charter. Section 2 contains the definitions of various terms used in the Act. The terms "dependent husband", "dependent parent", and "primary dependant" differentiate between men and women. The definitions have substantial effect,

because they interact with the "no-fault benefits" sections of the Act which govern the quantum of benefits payable to various dependants of an insured person.

Subsection 2(aa) provides that a wife is in most circumstances a "primary dependant". A husband, however, is only a primary dependant if he is a "dependent husband"; a husband who "by reason of physical or mental infirmity is unable to provide himself with the necessaries of life without the assistance of the insured". It is recommended that this distinction be abolished. The special definition of "dependent husband" found in subsection 2(i) should be repealed and subsection 2(aa) should be amended. One way of doing so would be to provide that a spouse of either sex, where there is one, is always presumed to be the primary dependant of the insured person. Another way would be to provide that the spouse who earned the least money in the preceding year is presumed to be dependent on the other. Or, the subsection could be amended to provide that a person is only dependent on his or her spouse where he or she is in fact supported by the spouse.

With any amendment to subsections 2(i) and 2(aa), other sections of the Act whose purpose is to off set the distinction between husbands and wives should be reconsidered. These sections are sections 27(4), 28(1), and 27(5)(b).

The definition of "dependent parent" contained in subsection 2(j) also discriminates on the basis of sex. Either parent is dependent within the meaning of the Act if he or she is unable, by reason of physical or mental infirmity, to provide him or herself with necessaries without the assistance of the insured person. In addition, however, a mother is presumed to be dependent if she is widowed or is married to a man who is incarcerated, has been committed to an institution, or is permanently incapacitated by disease or injury. There is no similar provision for a father. The subsection should be amended to eliminate this distinction, either by simple repeal of the part which applies only to mothers, by extension of that part so that it applies to fathers as well, or by substitution of a provision that a parent is dependent if he or she is in fact provided with necessaries by the insured.